

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

JUDY A. LONG, Personal Representative of the  
Estate of JAMES E. LONG, Deceased,

Plaintiff-Appellee,

v

DR. FOLAYAN GOODSON, HENRY FORD  
MEDICAL CENTER, HENRY FORD HEALTH  
SYSTEM, BOTSFORD GENERAL HOSPITAL,  
DANIEL L. RICHARDSON, D.O., DR.  
PENNINGTON, ROBERT BRECKENFELD,  
D.O., ANDREW HANS RIKKERS, DR.  
MAUREEN NELSON, DR. JENNINGS and  
SANFORD SKLAR,

Defendants,

and

EARL T. HECKER, D.O.,

Defendant-Appellant.

---

JUDY A. LONG, Personal Representative of the  
Estate of JAMES E. LONG, Deceased,

Plaintiff-Appellee,

v

FOLAYAN GOODSON, HENRY FORD  
MEDICAL CENTER, HENRY FORD HEALTH  
SYSTEM, EARL T. HECKER, D.O., DR.  
JENNINGS, and DR. SANFORD SKLAR,

Defendants,

UNPUBLISHED  
April 18, 2006

No. 261049  
Wayne Circuit Court  
LC No. 03-330994-NH

No. 261050  
Wayne Circuit Court  
LC No. 03-330994-NH

and

BOTSFORD GENERAL HOSPITAL, DANIEL L.  
RICHARDSON, D.O., ROBERT  
BRECKENFELD, D.O., DR. PENNINGTON, DR.  
ANDREW HANS RIKKERS, and DR. MAUREEN  
NELSON,

Defendants-Appellants.

---

JUDY LONG, Personal Representative of the  
Estate of JAMES E. LONG, Deceased,

Plaintiff-Appellee/Cross-Appellant,

v

DR. FOLAYAN GOODSON, HENRY FORD  
MEDICAL CENTER, and HENRY FORD  
HEALTH SYSTEM,

Defendants-Appellants/Cross-  
Appellees,

and

BOTSFORD GENERAL HOSPITAL, DANIEL L.  
RICHARDSON, D.O., DR. PENNINGTON,  
ROBERT BRECKENFELD, D.O., DR. ANDREW  
HANS RIKKERS, DR. MAUREEN NELSON,  
EARL T. HECKER, D.O., and DR. JENNINGS,

Defendants/Cross-Appellees,

and

DR. SANFORD SKLAR,

Defendant.

---

JUDY A. LONG, Personal Representative of the  
Estate of JAMES E. LONG, Deceased,

No. 261051  
Wayne Circuit Court  
LC No. 03-330994-NH

---

Plaintiff-Appellee,

v

No. 261052  
Wayne Circuit Court  
LC No. 03-330994-NH

DR. FOLAYAN GOODSON, HENRY FORD  
MEDICAL CENTER, HENRY FORD HEALTH  
SYSTEM, BOTSFORD GENERAL HOSPITAL,  
DANIEL L. RICHARDSON, D.O., DR.  
PENNINGTON, ROBERT BRECKENFELD,  
D.O., ANDREW HANS RIKKERS, DR.  
MAUREEN NELSON, EARL T. HECKER, D.O.,  
and DR. SANFORD SKLAR,

Defendants,

and

DR. JENNINGS,

Defendant-Appellant.

---

Before: Fort Hood, P.J. and White and O'Connell, JJ.

PER CURIAM.

Plaintiff Judy A. Long, as the Personal Representative of the Estate of James E. Long, Deceased, filed this wrongful death medical malpractice action against the various defendants. In these consolidated appeals, defendants appeal as of right from the circuit court's order granting their motions for summary disposition pursuant to MCR 2.116(C)(7), based on the statute of limitations, but which ordered the dismissal of plaintiff's action without prejudice. Plaintiff cross appeals in Docket No. 261051, challenging the circuit court's grant of summary disposition to defendants. We reverse and remand for further proceedings.

## I

Plaintiff filed this action on September 16 2003, alleging that on February 26, 2001, the decedent, Long, went to a Henry Ford Medical Center in Livonia, where he complained to Dr. Folayan Goodson that he was experiencing "fever, body aches, severe headaches, chills, myalgia, [and] diaphoresis." Henry Ford personnel obtained a sample of Long's blood and developed a blood culture on February 26, 2001, and on the next day, February 27, "Henry Ford Medical Center . . . received a positive blood culture for streptococcus pyogenes." In the meantime, Dr. Goodson apparently sent Long home without having prescribed antibiotics. Plaintiff alleges that after receiving the blood culture results, Dr. Goodson . . . and other Henry Ford employees "failed to contact . . . Long to inform him that he had sepsis of the blood and needed antibiotics immediately."

On February 27, 2001, Long went to the emergency room at Botsford General Hospital in Farmington Hills, where he “provid[ed] a history of acute right chest wall pain, soft tissue swelling, left lateral leg pain, urinary tract infection, blueish [sic] discoloration of left leg, rash, history of treatment by Henry Ford Medical Center . . . for stomach flu, including fever, body aches, headaches, chills, myalgia, diaphoresis and blood tests.” According to plaintiff, several Botsford defendants, Drs. Richardson, Pennington, Jennings, Hecker, Breckenfeld, Rikkers, Nelson, and Sklar “failed to timely diagnose Group A streptococcal infection, fasciitis and sepsis and failed to timely treat the infection with antibiotics.” On March 1, 2001, Long “died . . . from multi organ failure attributed to Group A streptococcal toxins.” Plaintiff’s complaint contained two counts, one applicable to the Henry Ford defendants and one relating to the Botsford defendants, each count alleging acts of medical malpractice that proximately caused Long’s death.

In December 2004, relying on *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), the Botsford defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), in which the remaining defendants later concurred.<sup>1</sup> Defendants asserted that in light of the facts that (1) their alleged acts of malpractice occurred on February 26 and 27, 2001, (2) Long died on March 1, 2001, (3) plaintiff obtained letters of authority appointing her as personal representative of Long’s estate on March 20, 2001, (4) plaintiff notified defendants of her intent to sue on March 13, 2003, and (5) plaintiff filed this action on September 16, 2003, plaintiff commenced this medical malpractice action well beyond the two-year period of limitation set forth in MCL 600.5805(5), and the wrongful death saving provision within MCL 600.5852, which extended the wrongful death period of limitation for two years after plaintiff received her letters of authority appointing her as personal representative of Long’s estate. Defendants averred that according to which applied retroactively to this case, plaintiff’s notice of intent to sue defendants for malpractice did not toll the wrongful death saving provision.

Plaintiff argued that the decision in *Waltz*, issued on April 14, 2004, could not apply retroactively as a basis for granting summary disposition to defendants because (1) in “calculating the filing deadlines applicable to this case,” plaintiff’s counsel relied on the Supreme Court’s decision in *Omelenchuk v Warren*, 461 Mich 567, 577; 609 NW2d 177 (2000), overruled in part by *Waltz*, *supra* at 648-650 n 11, 652-655, which instructed that “the tolling provision contained in [MCL 600.5856(d)] would apply to a cause of action that was timely filed by operation of the wrongful death savings provision, § 5852”; and (2) the *Waltz* decision overruled the precedent established in *Omelenchuk* and followed thereafter in many Court of Appeals decisions. Plaintiff also claimed that “the administration of justice would be adversely affected by a ruling giving retrospective application to *Waltz* because it would” deprive a class of litigants, including plaintiff, who relied on the *Omelenchuk* decision in commencing medical malpractice actions before April 14, 2004, the opportunity to avoid the newly promulgated period of limitation defense. Plaintiff added that prospective application of *Waltz* would not prejudice defendants, “who received . . . notice of intent in March 2003,” and thus “had full

---

<sup>1</sup> In April 2004, the parties stipulated to Dr. Sklar’s dismissal from the action with prejudice.

knowledge that . . . plaintiff intended to sue them and . . . detailed information about the substance of that claim.”

Plaintiff alternatively urged that the circuit court “should find that it would be inequitable to deprive her of a tolling of the statute of limitations during the time period that she was precluded from filing her case under § 2912b.” Plaintiff lastly suggested that the application of the abbreviated period of limitation announced in *Waltz* to this case would violate her due process rights, and that a new two-year extension of the applicable period of limitation under the wrongful death act, MCL 600.5852, had commenced “[o]n November 5, 2004, [when] the Wayne County Probate Court appointed a successor personal representative, Barbara Sabatini,” to administer Long’s estate.

Defendants replied that no judicial tolling could occur in this case because the applicable statutes plainly did not contemplate such a possibility. Defendants also averred that no authority supported the notion that “an action which has already been untimely filed by the original personal representative can subsequently be deemed timely filed through the appointment of a successor personal representative.”

At the summary disposition hearing on January 14, 2005, defendants reiterated their positions. Plaintiff’s counsel replied, “I know the court’s very aware of the case law under *Waltz*. My response simply is . . . I’m going to ask if you grant their motion that this case be dismissed without prejudice pursuant to [MCR 2.504(A)] . . . pursuant to the *Eggleston* case,”<sup>2</sup> which “makes clear that there is [sic] 2 years after a successor personal representative has to file a lawsuit.” Counsel and the court further discussed *Waltz* briefly before the court explained, “All right, I am going to grant the motion, . . . I am going to dismiss this matter without prejudice.” The court replied affirmatively to plaintiff’s counsel’s inquiry whether “it is a dismissal without prejudice and it’s not an adjudication on the merits, correct . . . ?”

Defendants filed objections to plaintiff’s proposed order granting summary disposition, which they asserted inaccurately described the court’s ruling as a partial grant of summary disposition premised on MCR 2.504(A). After a brief hearing concerning defendants’ motion, the circuit court entered a final order of dismissal providing that plaintiff’s claims were “dismissed without prejudice, and do not operate as an adjudication on the merits.”

## II

We first observe that a panel of this Court has rejected the distinction plaintiff seeks to draw between *Waltz* and *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004), and the instant case, based on the distinction between the two-year and three-year provisions of the savings statute. In *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566; 703 NW2d 115 (2005), the Court stated:

---

<sup>2</sup> *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).

Farley argues that neither *Waltz* nor *Ousley* addressed whether a suit is timely when, as here, the personal representative filed suit within three years after the two-year medical malpractice limitations period (MCL 600.5805) had expired, and therefore those cases do not determine the outcome here. It is true that, in *Waltz* and *Ousley*, the personal representative filed suit after both the two-year malpractice limitations period (MCL 600.5805) and the three-year ceiling set forth in the wrongful death saving provision (MCL 600.5852) had passed. However, this factual distinction makes no difference. As noted, the three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit: it is only a limitation on the two-year saving provision itself. [*Farley*, 266 Mich App at 574-575. Footnote omitted.]<sup>3</sup>

Thus, plaintiff's effort to distinguish *Waltz* and *Ousley* on this basis must fail.

### III

Plaintiff asserts that *Waltz*, decided on April 14, 2004, should not be applied to bar the instant case, in which the relevant procedural events occurred before the issuance of the *Waltz* decision. In *Ousley*, *supra* at 486, this Court rejected the plaintiff's argument that *Waltz* should be applied only prospectively. However, in *Mullins v St Joseph Mercy Hospital*, 269 Mich App 586; \_\_\_ NW2d \_\_\_ (2006), a panel of this court declared a conflict with *Ousley* pursuant to MCR 7.215(J), and this Court subsequently convened a special panel to resolve the conflict. The outcome of that case will determine this issue.<sup>4</sup>

### IV

Plaintiff also argues that if defendants' [and *Farley's*] interpretation of *Waltz* is correct, equity demands the application of judicial tolling because plaintiff was required to file the notice of intent under MCL 600. 2912, and further that she relied on *Omelenchuk v Warren*, 461 Mich 567; 609 NW2d 177 (2000), clarified and overruled in part in *Waltz*, *supra* at 652-655, in filing

---

<sup>3</sup> The *Farley* Court also stated:

We note that the three-year ceiling in this provision does not establish an independent period during which a personal representative may bring suit. Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it. [*Farley*, *supra* at 573 n 16 (emphasis in original).]

<sup>4</sup> We do not reverse on the basis of the rule set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002), as suggested by Judge O'Connell in his concurring opinion, because this is the precise issue to be determined by the conflict panel.

her claim when she did. In *Mazumder v Univ of Michigan Regents*, \_\_ Mich App \_\_ ; \_\_ NW2d \_\_ (2006)<sup>5</sup>, a panel of this Court agreed that separate and apart from the pure retroactivity question decided in *Ousley, supra*, the doctrine of equitable or judicial tolling applies in situations such as that involved here. Because this issue is dispositive regardless of the decision of the conflict panel, we reverse and remand for further proceedings.

V

Lastly, we address the parties' arguments concerning whether the circuit court properly determined that the dismissal should be without prejudice.<sup>6</sup> We conclude, based on *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 263686, issued 3/23/06), that the court did not err.<sup>7</sup>

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Helene N. White

---

<sup>5</sup> (Docket No. 261331, issued 2/23/06).

<sup>6</sup> Although plaintiff argues on appeal that the circuit court should have permitted her to amend her complaint to reflect her appointment as successor personal representative and to continue the case, in effect, as if she had refilled it, *McMiddleton v Bolling*, 267 Mich App 667, 672-674; 705 NW2d 720 (2005), precludes such relief. *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, Mich App (Docket No. 263686, issued 3/23/06).

<sup>7</sup> We recognize some inconsistency between *Verbrugghe* and *McLean v McElhaney*, 269 Mich App 196; \_\_ NW2d \_\_ (2005); however, *Verbrugghe* regarded *McLean*'s discussion of the res judicata issue as dicta, and *McLean*'s discussion of the dismissal with prejudice issue was based on the res judicata issue. Additionally, *McLean* reviewed the circuit court's decision to grant summary disposition with prejudice for an abuse of discretion. Here, the circuit court ruled that the dismissal should be without prejudice.